

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE**

**IN AND FOR NEW CASTLE COUNTY**

**IN RE:** )  
 ) CIVIL ACTION NUMBER  
**Vacation of Right-of-Way Located** )  
**On Colony Boulevard** ) 11M-08-087-JOH  
 )

*Submitted: February 21, 2012*

*Decided: April 5, 2012*

***MEMORANDUM OPINION***

*Upon Appeal from Commissioner's Findings of Fact and Recommendations  
Pursuant to Superior Court Civil Rule 132(a)(4) - **AFFIRMED***

***Appearances:***

A. Kimberly Hoffman, Esquire, of Morris James LLP, Wilmington, Delaware, Attorney for Petitioners

Adam L. Balick, Esquire, of Balick & Balick, LLC, Wilmington, Delaware, Attorney for Respondents

HERLIHY, Judge

Petitioners have sought to vacate a public right of way (“ROW”). The ROW at issue primarily abuts an apartment complex known as Summit Chase or Courtyard Apartments. None of the petitioners reside there, but all are employed by or connected with the owners of Summit Chase.<sup>1</sup> Their petition was opposed and a Commissioner of this Court conducted a hearing on the vacation petition. He determined that the petitioners had not met their burden needed to vacate a public ROW. Petitioners have sought review of the Commissioner’s decision. By Court rule, such review is *de novo*.<sup>2</sup>

The Court has read the entire transcript of the two-day hearing, examined the exhibits and the parties’ briefs. Based on its *de novo* review of the record, this Court finds petitioners have not shown the ROW at issue is no longer required for public use and/or that there is a public need for its vacation. The Commissioner’s decision, therefore, is AFFIRMED.

### ***Factual Background***

The factual setting for this dispute is unique. The ROW is a somewhat “war club” shaped with a handle and rounded end. On either side of it is a private road. On one side is Colony Boulevard, a road owned by the owners of Colony North and on the other side a parking area for tenants. Colony Boulevard starts at Lea Boulevard which is a public

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<sup>1</sup> At the hearing a petition signed by fifty Summit Chase residents was submitted favoring vacation of the ROW.

<sup>2</sup> Super. Ct. Civ. R. 132(a)(4)(iv).

highway. There is a small “wedge” of public ROW coming off Lea Boulevard which ends just before Shellpot Creek over which there is a small bridge and past that small wedge Colony Boulevard begins.

Colony Boulevard bisects Colony North Sections 1 and 2 on the east side from Section 3 on the west side. It continues on to where an apartment building of Colony North Section 2 is on the east side and apartment building of Summit Chase Apartments is on the west side. Summit Chase was previously known as Courtyard Apartments.

Just past these two apartment buildings is where the “club-like” ROW starts, initially as a street-like an extension of Colony Boulevard forming a “handle-like” portion of the club which continues on to become rounded. At the western tip of the rounded portion at about a sixty to seventy degree angle off the rounded part of the ROW there is a private road serving as means of ingress and egress for residents of two Summit Chase apartment buildings and an area for their parking. At either end of the ROW, therefore, there is private roadway. Where Colony Boulevard becomes the ROW, the Summit Chase owners have installed a gate which is sometimes closed.

How this isolated, peculiarly shaped public ROW came into being has its own unique history. The only person to recite that history before the Commissioner was Rosalind Paul, co-owner of Colony North.

Q. Are you familiar with how the right of way came about?

A. Oh, yes.

Q. Can you tell the Commissioner how it came about?

A. A number of years ago Summit Chase, it used to be Courtyard, was a Section 8 project, and we had a lot of trouble. Still do have a lot of trouble with it. And I was summoned to the Governor's Office by Mr. Strine, who's now Judge Strine. And at that meeting was my senator who wrote a letter, and a representative, and another representative, Judge Strine, and Susan Frank. Carper was there. The Governor may have stuck his head in. There was a lot of officials and representatives at that meeting, and me.

Q. And what was the purpose of the meeting?

A. The purpose of the meeting was to secure a safe place and place where vehicles could turn around into the cul-de-sac because it is a dead-end street. I mean, it is. I mean, that's just a fact of nature. It is. And I guess they sat and they called me in. And, in their wisdom, they saw in the future if they go to sell the place or whatever, that they would need places to turn around and all.

At that time there was not many cars that parked up there, because it was Section 8 and they didn't have it. But when they were - - it was a troubled complex looking to be sold in the years to come or whatever. And, in their wisdom, they sort of put that in. And thank God they did, because that gave us egress and ingress when the bridge went down. If not, everybody would be in there. We would have to start helicoptering them out.

Q. What was there prior to the right of way being created?

A. You mean the whole right of way, [Counsel]?

Q. Correct.

A. Well, our egress and ingress that went past to our townhouses, and then this was just parking. And I guess this was the roadway to get into Courtyard, Colony Boulevard at that point.

Q. You heard [DelDOT's Director of Planning] Mr. Strange last week testify that sometimes street funds are used for repaving projects. Was this a repaving project?

A. No.

Q. In what way was it not a repaving project?

A. One of our representatives gave some of - - because the cul-de-sac wasn't there. So DelDOT put the cul-de-sac in. It was drawn to standards. They put it in. New Castle County approved it.

There was a major land subdivision at that particular point. I had to give up some of my offsets in the back here by my townhouses. They had a major land subdivision. They moved the property line a little bit. They had, I think, a foot between Courtyard and Pettinaro's piece, which is the back undeveloped at this time.

And, no, it wasn't a repaving job at all. And, plus, the suburban street funds that went in there. There was also federal money that went in there to complete the project. And in order for that to occur, I had to - - part of the problem was that they were - - well, we're reaching that problem now, too. A saturation of school children that wasn't safe, also. We now have 70 school kids that use the bus stop, which is one of their largest bus stops. It was put in for numerous reasons, for emergency vehicles. There was no access.<sup>3</sup>

Several years ago Shellpot Creek severely flooded and washed out the Colony Boulevard bridge over Shellpot Creek preventing access to and from Lea Boulevard. The Governor declared a state of emergency to allow reconstruction to start quickly, but another temporary route through another, third, private complex had to be built to allow vehicular ingress and egress to Summit Chase and Colony North.

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<sup>3</sup> Revocation Hr'g Tr. 14-17, Dec. 13, 2011 (all errors in original).

Other testimony before the Commissioner can be summarized as follows:

1. While school buses for a while came all the way in Colony Boulevard and used the rounded “club” portion of the ROW to turn around, they no longer do. All the school children, approximately seventy, wait for their buses in the small shopping center parking lot at the corner of Lea and Colony Boulevards.
2. The Brandywine School District indicated it did no longer wanted to use the turn around area.<sup>4</sup> The District’s representative testified to that effect but stated no formal position on the petition.
3. The Delaware Department of Transportation indicated it did not oppose vacating this ROW.<sup>5</sup> Robert Strange, DeIDOT’s director of planning, who also oversees requests for road vacations testified. When reviewing such requests, he said, it is the agency’s function to determine if there is a “paramount” or “supreme” public transportation need to keep a roadway open. It could not find such a need with this ROW.<sup>6</sup> Strange described DeIDOT’s position as “agnostic.”<sup>7</sup>
4. Brandywine Hundred Fire Company “strongly opposes” the vacation. It did so in a letter (no testimony) stating in part:

Brandywine Hundred Fire Company is the primary volunteer fire company that services this complex with Fire, Rescue and Ambulance Services and we as a company are very familiar with the dynamics of this existing area. Therefore, the vacating and subsequent closing of this existing cul-de-sac would be a major obstacle for our department, and possibly compromise the public safety of the residents who reside in the surrounding complexes, especially during emergency situations and conditions.

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<sup>4</sup> Petitioner’s Ex. 15.

<sup>5</sup> Petitioner’s Ex. 11.

<sup>6</sup> Revocation Hr’g Tr. 92, Dec. 9, 2011.

<sup>7</sup> Revocation Hr’g Tr. 96, Dec. 9, 2011.

Our first responders have come to know and rely on this area when we are dispatched for emergencies. This designated area is vital to emergency responses in several capacities such as but not limited to, set up of fire and rescue vehicles, staging of emergency equipment and the ability to negotiate and maneuver without the additional obstacle of parked vehicles.<sup>8</sup>

5. Other than the fire company, the primary opposition to this vacation petition came from the owners of Colony North. Their concerns were trucks and other vehicles not having access to turnaround area would have to use their property to turn around due to the existence now of the gate at the line separating Colony Boulevard from the ROW. The gate is sometimes open. Fire trucks apparently have electrical override devices if they confront it while closed. For non-residents, needing to get past the gate, special arrangements would have to be made to open it, such as for delivery trucks. If a special needs child were to live in an apartment inside the gate, the school district would need to get past the gate to get him or her on a bus.<sup>9</sup>
6. One of the reasons the school district stopped using the turnaround (“club” shaped) area was because of Summit Chase’s placement of dumpsters there and because its residents were illegally parking in it. The parking problems for Summit Chase have become a real problem for it. At the hearing, the Summit Chase produced a proposal to address apparent significant parking problems its tenants confront.<sup>10</sup> One of the areas to be used to increase parking would be the ROW at issue. Other areas, including what is now a tennis court would be used.

It is reasonably fair to deduce from the testimony that competitive juices involving Summit Chase owners and Colony North owners play a large role in the relative positions in this dispute. There are hints Colony North shows prospective tenants the parking

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<sup>8</sup> Respondent’s Ex. 3.

<sup>9</sup> Revocation Hr’g Tr. 144, Dec. 9, 2011.

<sup>10</sup> Petitioner’s Ex. 4.

problems with Summit Chase to get them to lease with them. The record is fairly clear that Summit Chase has insufficient parking for its tenants.

The unique shape, location, and isolation of this ROW distinguish it from the factual settings of the few precedents concerning public road vacation. In the case of *Petition of Duffy*,<sup>11</sup> when there was a petition to close a public street, the local school district was neutral as was the then Highway Department and the local fire company. Nevertheless, this Court denied the petition to vacate.

In this case, the fire company opposes vacation, the local school district is neutral and DelDOT uses an archaic expression of “agnostic” to describe its unopposed position.<sup>12</sup> In the case of *Petition of Archer*,<sup>13</sup> DelDOT and Smyrna were opposed to the vacation of a “public road.” The road existed on paper and had never been opened and was a flat grassy strip. The petition to vacate was denied as the “strip” would potentially provide access from one public road to another.

But these two cases, while of little factual precedential value, clearly establish Delaware law underpinning whether this Court should grant or deny a petition to vacate.

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<sup>11</sup> 444 A.2d 301 (Del. Super. 1982).

<sup>12</sup> Revocation Hr’g Tr. 13, Dec. 9, 2011.

<sup>13</sup> 1998 WL 733028 (Del. Super. Aug. 20, 1998).

It is a two part test: (1) the road is no longer needed for public use or convenience and (2) there is a public need for its vacation.<sup>14</sup>

The record shows there are not large numbers of the public who use the ROW at issue; it is mostly used by residents of Summit Chase. As to the Summit Chase tenants who need to traverse the ROW to get to and from their apartments, there is no need, in that respect, to keep it “public.” Their visitors, however, are a different issue. The school district at the moment, does not need access to it or travel over the ROW. The fire company apparently would or might be able to open the gate with equipment it has. The need for Colony North residents to ever again to traverse it in an emergency such as the bridge wash out and consequent detour is problematical. But trucks need to turn around that cannot get past the closed gate, thereby creating a traffic hazard when backing up. In sum, however, this Court’s *de novo* review of the record cannot lead to a conclusion that this ROW is no longer needed for public use or convenience.

The more significant barrier to vacating this ROW is petitioners have failed to show that there is a public need for its vacation. This is not the same, more limited, view of DeIDOT that there must be a “paramount” or “supreme” need to keep a roadway open. That determination, as Strange’s testimony betrayed, is partly fiscally driven - maintenance

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<sup>14</sup> *Petition of Duffy*, 444 A.2d 302; *Petition of Archer*, 1998 WL 733028 at 2.

costs. But the test is whether there is a public need to vacate this ROW. With the need to allow visitors, delivery trucks, fire trucks and potentially access for a school bus for a special needs student, petitioners cannot show a public need to vacate this ROW.

Accordingly, petitioners have failed to show why this ROW should be vacated. To state the obvious, the gate must be kept open at all times.

*Conclusion*

For the reasons stated herein, the Commissioner's decision to deny the petition to vacate is **AFFIRMED**.

**IT IS SO ORDERED.**

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J.